

Solvent Services, Inc. and Laborers' International Union of North America, Local 368, AFL-CIO, Petitioner. Case 37-RC-3613

February 14, 1994

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND TRUESDALE

The National Labor Relations Board has considered objections to a mail-ballot election held between February 18 and March 4, 1993, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows four for and three against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, adopts the Regional Director's findings and recommendations, and finds that a Certification of Representative should be issued.

On March 5, 1993, Subregion 37 conducted a tally of ballots in a mail-ballot election involving a unit of the Employer's Oahu employees. Both the Employer and the Petitioner designated observers for the tally. The Employer selected its vice president, Joseph Almony, while the Petitioner chose organizer David Homalon as its observer.

Prior to the count, the Board agent instructed Almony and Homalon to check voters' names off the *Excelsior* list as he showed them the corresponding mail-ballot envelopes.¹ Also prior to the count, the Board agent informed the observers that a voter in the Oahu unit had hand delivered his ballot to the Subregion after the March 4 deadline. The Board agent asked the observers if either wished to challenge the late ballot; both declined.

As the Board agent showed the observers each ballot envelope, they checked the name off the list. When the Board agent reached the envelope of Damien Ford, the observers checked his name, without comment, notwithstanding a typed notation on the list after his name stating, "[p]ermanent layoff as of February 12, 1993."² This notation had been inserted by the Employer's attorney.

¹ Homalon stated that prior to the tally the Board agent additionally instructed the observers in the challenge procedure. Almony conversely claims that the Board agent did not fully apprise the observers of the challenge procedure. Because the Regional Director relied on other evidence when resolving the objections, he did not resolve this credibility dispute.

² In a statement subsequently provided to the Region, Almony contends that he: (1) knew Ford had been laid off (indeed, he recommended the layoff); (2) saw the annotation after Ford's name; (3) wondered why Ford's name had not been removed from the eligibility list; and (4) assumed that the Board had determined that Ford

After all the names on the ballot envelopes had been checked against the *Excelsior* list, the Board agent opened the envelopes, and commingled and counted the ballots.

Following the election, the Employer filed objections, alleging that: (1) Ford was ineligible to vote because he had been permanently laid off; and (2) the Board agent failed to follow proper procedure by not challenging Ford's eligibility even though Ford's layoff was noted on the *Excelsior* list.

The Regional Director recommended overruling the Employer's objections. The Regional Director found that parties have the primary duty to challenge, and that Board agents have no obligation to challenge merely because of eligibility disputes.³ The Regional Director additionally found that the Employer's objections were in the nature of a postelection challenge which the Board will not accept unless, as discussed in *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 333 (1946), the "Board's agents or the parties benefiting from the Board's refusal to entertain the issue [knew] of the voter's ineligibility and suppress[ed] the facts." The Regional Director concluded that the *A. J. Tower* exception was inapplicable because an 8(a)(3) charge alleging that Ford had been unlawfully laid off was still in the investigatory stage and the Employer had not yet submitted its evidence. In these circumstances, the Regional Director concluded that neither the Board nor its agent knew the critical facts concerning Ford's eligibility.

Finally, the Regional Director rejected the Employer's claim that Almony was unaware of the challenge procedure. The Regional Director noted that: (1) the customary election notices, detailing the challenge procedure, had been sent to all parties;⁴ (2) the Board agent had asked Almony if he wished to challenge a late ballot; and (3) Almony admitted that, but for his erroneous conclusion that the Board had determined Ford to be eligible, he would have questioned Ford's eligibility. On these facts, the Regional Director determined that Almony knew the challenge procedure and either inadvertently or negligently failed to challenge Ford. Citing *Fern Laboratories*, 232 NLRB 379

was eligible to vote. Almony said that he thought the Board had prepared the annotated *Excelsior* list and that, had the notation been missing, he would have questioned Ford's eligibility.

³ He relied on *Corral Sportswear Co.*, 156 NLRB 436 (1965), *enfd.* 383 F.2d 961 (10th Cir. 1967), *cert. denied* 390 U.S. 995 (1968); *De Vilbiss Co.*, 115 NLRB 1164 (1956); *Balfre Gear & Mfg. Co.*, 115 NLRB 19, 23 (1956); *Sears, Roebuck & Co.*, 114 NLRB 762, 763 (1955); *Calcor Corp.*, 106 NLRB 539 (1953); and *Galli Produce Co.*, 269 NLRB 478 fn. 1 (1984).

⁴ Specifically, Form NLRB-4910, which was provided the parties states, in part, that:

CHALLENGE OF VOTERS: An agent of the Board or an authorized observer may question the eligibility of a voter. Such challenge MUST be made at the time the ballots are counted before the name stub has been detached from the ballot envelope.

(1977), he concluded that Almony's mistake was not one against which the Board agent was required to guard.

The Employer excepts, arguing that Board agents may challenge, for cause, the eligibility of any participant in an election. The Employer further contends that under Section 11338 of the Board's Casehandling Manual,⁵ the Board agent was required to challenge Ford's ballot because he "knew or [had] reason to believe" he was ineligible. In this regard, the Employer argues that the annotated *Excelsior* list, coupled with the pending unfair labor practice charges challenging Ford's layoff, established "good cause" for the Board agent to question Ford's eligibility. Moreover, argues the Employer, even if the parties were primarily responsible for challenging voters, the Board agent had a secondary duty to challenge. Finally, the Employer reiterates its argument that the Board agent was obligated to challenge Ford's ballot because Almony did not understand the challenge procedure.

The Petitioner filed a brief opposing the exceptions, arguing that the Employer's own action of: (1) inserting Ford's name on the list; (2) failing to challenge his ballot; and (3) not providing timely evidence in the unfair labor practice case caused Ford's vote to be tallied.

Having considered all the evidence and arguments, we agree with the Regional Director that the Employer's objections lack merit.

Preliminarily, we note that Congress has entrusted the Board with broad discretion in establishing procedures and safeguards for ensuring fair and free representation elections. *NLRB v. A. J. Tower Co.*, supra. In exercising this discretion, the Board has long held that parties to an election bear the primary responsibility for challenging voter eligibility. *Balfre Gear & Mfg. Co.*, 115 NLRB 19, 22 (1956); *Galli Produce Co.*, 269 NLRB 478 (1984). The Board has further determined that, in the interest of promoting election finality, postelection challenges will not be permitted. *NLRB v. A. J. Tower Co.*, supra; *Sears, Roebuck & Co.*, 114 NLRB 762, 763 (1955). One exception has been created to the no "post-election challenge" rule. If the Board agent or party benefiting from the rule knew of the voter's ineligibility and suppressed the

facts, a postelection challenge is permitted. *NLRB v. A. J. Tower Co.*, supra, 329 U.S. at 333.

The *A. J. Tower* exception, however, is narrowly construed. The Board and courts have held that a Board agent is not obligated to challenge a voter merely because the agent is aware of an eligibility dispute. Instead, the primary duty to challenge lies with the parties,⁶ and the Board agent need challenge only where the agent has actual knowledge of the voter's ineligibility. *NLRB v. Paper Art Co.*, 430 F.2d 82, 84 (7th Cir. 1970), and cases cited. Thus, consistent with this narrow exception, the Board has refused to set an election aside merely because the Board agent knew that the parties had agreed to challenge an employee's eligibility. *Fern Laboratories*, supra.

Here, we agree with the Regional Director that the *A. J. Tower* exception is inapplicable. The evidence does not establish that the Board agent had actual knowledge of Ford's ineligibility at the time of the tally of ballots. At most, the Board agent knew that Ford's eligibility was in dispute. Thus, the *Excelsior* list prepared by the Employer included Ford among its employees on February 15, 1993. Although there was a notation on the list that Ford had been permanently laid off on February 12, the Employer—which had received the standard notice-of-challenge procedures—never announced its intent to challenge Ford. Further, Almony, a high-ranking official of the Employer who participated in the layoff decision, gave no indication at the tally of ballots that he disputed Ford's eligibility.⁷ Finally, the unfair labor practice charge alleging that Ford had been unlawfully laid off was still under investigation at the time of the March 5 tally. In these circumstances, we agree with the Regional Director that the exception to the rule against postelection challenges is inapplicable.

We also reject the contention that the Board agent was obligated to challenge Ford's ballot under Section 11338 of the Board's Casehandling Manual. It is well settled that the provisions of the Casehandling Manual are not binding procedural rules. *Correctional Health Care Solutions*, 303 NLRB 835 (1991). These provisions are merely intended to provide operational guidance in the handling of representation cases. *Kirsch Drapery Hardware*, 299 NLRB 363 (1990). Under *A. J. Tower* and its progeny, the Board agent was not obligated to challenge Ford's ballot because the agent lacked actual knowledge of Ford's ineligibility.⁸

⁵The Board's Casehandling Manual (Part Two), Representation Proceedings Sec. 11338, provides, in relevant part, that:

Any observer has the right to challenge a voter for cause. The Board agent must challenge anyone whose name is not on the eligibility list or who has been permitted by the Board to vote subject to challenge. Also, the agent must challenge a voter if he/she knows or has reason to believe that the voter is ineligible to vote, but, in this instance only if none of the parties voices a challenge on that ground. The Board agent will not make challenges *on behalf of the parties* whether or not such parties have observers present. See *Galli Produce Co.*, 269 NLRB 478 (1984). [Emphasis in original.]

⁶*Balfre Gear & Mfg. Co.*, supra; *H & L Distributing Co.*, 206 NLRB 169 fn. 1 (1973).

⁷For the reasons set forth by the Regional Director, we reject the Employer's contention that Almony did not understand the challenge procedure and that, accordingly, the Board agent was obligated to act in his stead.

⁸We additionally note that Board agents are given broad discretion in the conduct of elections. See, e.g., *Inland Waters Pollution Control*, 306 NLRB 342, 343 (1992). Although the Board agent, exercis-

Accordingly, under all these circumstances we agree with the Regional Director that the Employer's objections should be overruled and a Certification of Representative issue.

ing this discretion, might validly have objected to Ford's ballot under the facts of this case, the agent's failure to do so is not a basis for setting aside the election.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Laborers' International Union of North America, Local 368, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All employees employed by the Employer on the Island of Oahu, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.